



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2006

Mr. Juan J. Cruz
Escamilla & Poneck, Inc.
5219 McPherson Road, Suite 306
Laredo, Texas 78041

OR2006-07498

Dear Mr. Cruz:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 253881.

The United Independent School District (the "district"), which you represent, received two requests from the same requestor for five categories of information relating to four tracts of land, the acquisition of property owned by Laredo Hills, Ltd. or J.R. Hurd, and any information related to a closed session of the district's board of trustees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You claim that the requested certified agenda is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Thus, such information cannot be released to a member of the public in response to an open records

request.¹ See Open Records Decision No. 495 (1988). In addition, minutes of a closed meeting are confidential. See Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); see also Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under OMA); Open Records Decision No. 495 (1988) (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). Thus, we agree that the information requested pertaining to an executive session of the district must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We note that a portion of the submitted information is subject to section 552.022 of the Government Code. This section provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(1),(3). The submitted information includes contracts relating to the expenditure of public funds and completed appraisal reports made for the district. Such information must be released under section 552.022, unless it is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. You claim that this information is excepted from disclosure under sections 552.103 and 552.105. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). As such, sections 552.103 and 552.105 do not qualify as other law that makes information confidential for the purposes of section 552.022.

¹As you acknowledge, the district is not required to submit the certified agenda or tape recording of a closed meeting to this office for review. See Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code).

Therefore, the district may not withhold this information, which we have marked, under these exceptions.

We now address your section 552.103 claim against disclosure for the remaining information not subject to section 552.022. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective prosecutor or plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis.

You explain that the district contemplated condemnation proceedings to acquire the property at issue. After reviewing the district's arguments and the documents at issue, we agree that litigation was reasonably anticipated on the date the district received the request for

information. We further find that the remaining information relates to the anticipation litigation.

We note, however, that some of the documents at issue reflect on their face that they were obtained from or provided to an opposing party in the anticipated litigation. Once information has been obtained by all parties to a litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the remaining information has either been obtained from or provided to any of the opposing parties or their representatives, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the remaining information has not been obtained from or provided to any of the opposing parties or their representatives, it may be withheld from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that a portion of the remaining information that has been seen by the opposing party is subject to section 552.105 of the Government Code. This section excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. This provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to the negotiations is not complete. *See* Open Records Decision No. 310 (1982). Pursuant to section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (*quoting* Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

You state that the documents pertain to negotiations that "relate to location or purchase price of property sought to be purchased by the district." The information at issue relates to negotiations that are not yet finalized. Based on our review of the information at issue and

your representations, we find that the remaining information at issue may be withheld under section 552.105.

Lastly, we note that some of the information subject to section 552.022 appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the certified agenda or tape of an executive session of the district must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. We have marked the submitted information that is subject to section 552.022 of the Government Code and must be released. In releasing copyrighted information, the district must comply with copyright law. To the extent that the remaining information has not been obtained from or provided to any of the opposing parties or their representatives, it may be withheld from disclosure under section 552.103 of the Government Code. The remaining information in Exhibit C-4 may be withheld under section 552.105.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Brian J. Rogers
Assistant Attorney General
Open Records Division

BJR/ir

Ref: ID# 253881

Enc. Submitted documents

c: Ms. Karen Kerr.
P.O. Box 499
Laredo, Texas 78042
(w/o enclosures)